SUPREME COURT, U. S.

FILED

In the

Supreme Court

of the

United States

OCTOBER TERM, 1956

No. 1110

ROBERT S. HOOVER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the

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OCTOBER TERM, 1970

No. _____

ROBERT B. ROBERTS,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Robert B. Roberts, the petitioner, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on November 17, 1970.

NOTE: All Emphasis Supplied

R: References to Record on Appeal before Fifth Circuit.

T: Transcript of trial proceedings in record below.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is unreported and is printed in Appendix A attached hereto, infra, page App. 1. The judgment of the Fifth Circuit Court of Appeals is printed in Appendix A attached hereto, infra, page App. 8.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals, was entered on November 17, 1970. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether a defendant has a constitutional right to be present at an evidentiary hearing?

II. Whether a defendant's constitutional rights may be waived at any evidentiary hearing in his absence and without the specific and knowledgeable consent of the defendant?

III. Whether the waiver of a defendant's constitutional rights is such a "critical stage" of any evidentiary hearing as to require the presence of the defendant at the point of the making of the waiver?

IV. Whether the Supreme Court should promulgate a set of rules to govern procedures at evidentiary hearings?

STATEMENT OF THE CASE

The petitioner, Robert B. Roberts, was indicted on June 14, 1961 along with nine other co-defendants for multiple violations of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. § 77q(a); the Mail Fraud Statute, 18 U.S.C. § 1341; and 18 U.S.C. § 371. The trial commenced June 11, 1962 and the jury returned its verdict July 19, 1962. Roberts was found guilty and was sentenced August 20, 1962.

There were numerous appeals to the Fifth Circuit Court of Appeals as well as to the Supreme Court of the United States by various defendants.

In proceedings before the Court of Appeals pursuant to this Court's previous remand, *Levine v. United States*, 383 U.S. 265 (1966) the Fifth Circuit Court of Appeals granted petitioner's co-defendant Levine a new trial based upon a disclosure by the Government that after the return of the indictment, agents of the Federal Bureau of Investigation monitored conversations between Levine and Levine's attorney. But the Court of Appeals denied petitioner's motion for the same relief or alternatively, for a remand to the District Court for an evidentiary hearing to determine whether he was prejudiced by the monitoring. The Court of Appeals stated that the motion was denied " . . . without prejudice to such application by him to the District Court as may be appropriate."

Roberts filed a petition for a Writ of Certiorari to this court and same was granted, *Roberts v. United States*, 389 U.S. 18 (1967).

This Court vacated Robert's conviction. The matter was remanded to the United States District Court, Southern District of Florida, with directions to afford Roberts an evidentiary hearing. Evidentiary hearings were conducted and Roberts was represented by counsel, but was not present at the said hearings. Testimony was presented by the government and Roberts did not confront the witnesses who testified nor was he present to aid and assist counsel in this matter. Counsel for Roberts decided to travel the road of the Sixth Amendment thereby waiving Roberts Fourth and Fifth Amendment rights in the case.

Ultimately, the District Court Judge found for the government and reinstated the conviction and affirmed the sentence imposed upon Roberts.

Upon appeal to the Fifth Circuit Court of Appeals, all the questions stated above were presented to the Court. The Fifth Circuit affirmed the decision of the District Court.

REASONS FOR GRANTING THIS WRIT

The Sixth Amendment to the Constitution of the United States guarantees to the accused the right " . . . to be confronted with the witnesses against him . . . ", as does Rule 43 of the Federal Rules of Criminal Procedure.

A Defendant has the right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the crime charged. This Court espoused the existence of this right in a prosecution for a felony. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

Although this right in the past has been confined to the right to be present at the trial of the accused, it is submitted that this right should be extended to evidentiary hearings where testimony is taken that may be adverse to a Defendant.

"Since cross-examination is a basic right rooted in the Constitution of the United States it should not be eliminated except by the highest authoritative legislative provision or judicial decision, *Brown v. U. S.*, 234 F.2d 140, 145 (6th Cir. 1956)."

The evidentiary hearing involving the petitioner was held to determine whether he was prejudiced by the illegal monitoring of the F.B.I.

This hearing was just as vital in the determination of the Petitioner's guilt or innocence as the trial itself. Where witnesses are called to testify about facts which bear directly upon a Defendant's innocence he should not be denied his constitutional right to confront these witnesses. Who better than the Defendant himself, who is a party to the litigation, can aid his attorney in the cross-examination of witnesses when the testimony relates to innocence or guilt?

The right of the Defendant to be present at an evidentiary hearing has not yet been ruled upon by the Appellate Courts, however, this is no reason for not applying this right in evidentiary hearings. The Fifth Circuit felt that an issue of such monumental importance could best be answered by stating, "No Appellate Court has extended this right to an evidentiary hearing."

This is far from an adequate answer for a question of such magnitude. Many times in the law, an Appellate Court must take the initiative and answer questions. The answer given by the Court lacked courage and conviction, inasmuch as the Fifth Circuit Court of Appeals did not want to come to grips with this question; which question is monumental in the practice of criminal law.

It is the duty and responsibility of Appellate Courts not to stifle the growth of our constitutional law, as was done by the Fifth Circuit, but to foster its expansion when necessary.

In *Kay v. U. S.*, 223 F.2d 442, 443 (6th Cir., 1956) the Court, interpreting this Court's decision in the same case [348 U.S. 934 (1955)] stated that it was implicit that the Supreme Court clearly intended that the Appellant should be present to testify at a hearing on a post trial petition.

In *McKissick v. U. S.*, 379 F.2d 754, 761 (5th Cir., 1967) this Court held " . . . a Defendant is entitled to confront witnesses, cross-examine and give testimony . . . ." This court also ruled that the District Court was to hold a hearing to determine, among other issues, whether the Defendant was denied his right to be present. It seems only logical that the Defendant's presence, at this post trial evidentiary hearing, would be required, if not properly waived.

The right of confrontation is so firmly implanted in our American jurisprudence that testimony taken at a preliminary hearing in the absence of the Defendant or where he is not given the opportunity to cross-examine

the witnesses, will not be admitted in a subsequent trial. Thus, a Defendant must be granted the right to be present at *any* evidentiary hearing.

The question of presence at an evidentiary hearing *cries out* for an answer as more and more evidentiary hearings are getting into the trial courts and clogging the calendars. An answer to this question would be an invaluable aid to the trial Judges, the United States Attorneys and defense counsel. If this answer is coupled with a set of rules which would govern evidentiary hearings it would greatly aid the speedy administration of justice in our district courts.

Judge Charles B. Fulton analogized an evidentiary hearing to an Appellate hearing, in reasoning that the Defendant's presence was not required, (R. 316). There are no witnesses called by an Appellate Court, however, witnesses are called in to testify in an evidentiary hearing. It thus would follow that the Defendant should have the constitutional right guaranteed him to confront these witnesses. The right to be present to aid in his own defense is so imbedded in our judicial conscience, it need not be belabored.

Although Petitioner's counsel and the Court indicated the waiver of Roberts' right to be present, it should be noted that it was their feeling that said presence was not required at a proceeding of this type (R. 4-5).

THE COURT: Is Mr. Roberts here?

MR. ROSEN: He is not, your Honor, and Mr. Gradsky is not present either.

THE COURT: Well, what do you have to say to that—

MR. ROSEN: As to Mr. Gradsky, your Honor, he is in custody.

THE COURT: I know

MR. ROSEN: As I understand it, for an evidentiary hearing of this sort their presence is not required.

THE COURT: Do you agree with that?

MR. ROSEN: I do.

THE COURT: Mr. Weltner, is your client present?

MR. WELTNER: Yes, sir; he is here.

THE COURT: Do you agree with that position with respect to both Gradskys? I guess that Mrs. Gradsky is present.

MR. ROSEN: She is not, sir.

THE COURT: Neither he nor she and also Mr. Roberts, are not present?

MR. ROSEN: That's right, your Honor.

It is the Petitioner's contention that this mistake was due not to carelessness nor a misunderstanding of the law but rather to a failure of the Courts to promulgate a set of rules to be followed in this new breed of proceedings; "the evidentiary hearing."

The evidentiary hearings that were held were critical stages of the proceedings in the instant case that would fall within the scope of Rule 43. The hearings were held

to determine whether or not the evidence presented at the Defendant's trial was tainted. It was this evidence that had direct effect upon the Defendant's guilt or innocence.

The Fifth Circuit Court of Appeals is of the opinion that there are frequent occasions in a criminal proceeding when an accused must trust in his attorney's ability to make tactical decisions and judgments without prior consultation with his client. The waivers of the petitioners Fourth and Fifth Amendment rights can not be considered "tactical decisions."

This may be true in many instances during a trial, but can we call the waiver of a Defendant's right to confront witnesses a tactical decision by an attorney? The Appellate Court stated that they saw no way in which this Defendant would have aided trial counsel and concluded by saying, "It's apparent that these hearings were not a "critical stage" of the proceedings . . . " and . . . "harmless error . . . ".

If matters such as these were always *apparent* and the *error always harmless*, our jurisprudence would be devoid of decisions like Miranda and Escobedo. These cases also could have been disposed of by saying the error was harmless. When a trial judge allows an attorney to make such a tactical decision the *error cannot be called harmless.*

When trial counsel decided to travel the road of the Sixth Amendment, he excluded any argument regarding the Fourth and Fifth Amendments, without an intelligent waiver by the defendant. This is in opposition to the philosophical concepts of our constitution. See *Himmelfarb v. United States*, 175 F.2d 924, 931 (9th Cir. 1949), infra.

We invite the Court's attention to what transpired in the East Courtroom of the Southern District Court on April 11, 1969:

> THE COURT: Now, Mr. Rosen, the Court will appreciate it greatly if you will make a statement as to the scope—strike that and put it this way.
>
> The Court will appreciate it very much if you will very briefly point out and precisely, what portions of the Constitution or its Amendments or the Statutory Law which you rely upon for the relief that is sought here for the Petitioners. To make it a little easier for you to deal with, I would like to know if the relief sought is sought exclusively under rights that are granted by the Sixth Amendment to the Constitution of the United States.
>
> MR. ROSEN: In light of the recent decisions, your Honor, I believe the only road we can travel will be under the Sixth Amendment.
>
> THE COURT: And therefore, at this time may I exclude from consideration entirely the Fourth and Fifth Amendments and deal with the Petitions that have been filed here, with respect to whether there has or had not been in some way an invasion of the right of counsel under the Sixth Amendment? I might add that I asked you to make this statement to me because after a very careful inspection of all the memos that have been filed and the arguments that have been heard, I am left with the impression that the

relief sought is under the Sixth Amendment and exclusively, under the Sixth Amendment and I would like to be sure that that is your position.

MR. ROSEN: We will travel that road, your Honor.

THE COURT: Is that agreeable?

MR. ROSEN: Yes, Sir.

THE COURT: Is that our understanding?

MR. ROSEN: Yes, sir.

THE COURT: Thank you.

(Thereupon the hearing was concluded.) (R. 285-287)

As is obvious from the foregoing excerpts from the transcript, the Learned District Judge in an apparent effort to protect the rights of this Defendant, placed Trial Counsel in the position of having to "shoot from the hip" and in so doing waive his Client's Fourth and Fifth Amendment rights. " . . . it is plain that no stipulation of counsel waiving his client's constitutional right could be effective without the client's specific assent. In absence of express authority an attorney has no power to surrender substantial legal rights of his client." *Himmelfarb v. United States*, 175 F.2d 924, 931 (9th Cir. 1949).

A waiver is the intentional relinquishment or abandonment of a known right or privilege.

A presumption exists against the waiver of fundamental rights by an accused as his constitutional rights must be jealously and vigilantly guarded. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Glaser v. United States*, 315 U.S. 60, 70 (1942).

As [redacted] stated in *United States v. Auerbach*, 420 F.2d 921, (5th Cir. 1969) at page 5:

> "A waiver of one's Constitutional right cannot be inferred from a silent record, and the Courts must indulge in every reasonable presumption against a waiver of a fundamental constitutional right."

Could Mr. Roberts knowingly and voluntarily waive his Constitutional rights when he wasn't even present at these hearings?

At the point when Roberts' Trial Counsel traveled down the road of the Sixth Amendment (R. 286-287), precisely, at that moment, the hearing became critical.

The Court should have required Roberts' presence so that it (the Court) could determine if Roberts fully understood his rights and the possible consequences that would result from such a waiver, and, whether or not Roberts did in fact wish to waive these rights. *Johnson v. Zerbst*, Supra, *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963).

The Fifth Circuit Court states that the Defendant's absence from the hearing did not effect his substantial rights. How substantial are the Constitutional guarantees and rights under the Fourth and Fifth Amendments?

All of these matters require clarification and sound judicial interpretation and it behooves the entire profession, both practitioners and judiciary, to take a long hard look at the evidentiary hearings and set down guide lines for all of us to follow. The need for a set of rules to govern these hearings can not be overlooked. We can not allow the possibility of confusion or misunderstanding to interfere with anyone's constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Fifth Circuit reversed, and the final judgment of the trial court should be reversed and set aside.

Respectfully submitted,

S. GEORGE BERKLEY
Attorney for Petitioner
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111 N. E. First Street
Miami, Florida 33132

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition was mailed to the following named persons: HONORABLE ERWIN N. GRISWOLD, Solicitor General of the United States, Department of Justice, 9 Pennsylvania Avenue, N.W., Washington, D.C., and HONORABLE ROBERT W. RUST, United States Attorney, Post Office Box 1070, Miami, Florida, this 14th day of December, 1970.

S. GEORGE BERKLEY

APPENDIX

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 28287

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

NORMAN GRADSKY and ROBERT B. ROBERTS,
Defendant-Appellants.

Appeal from the United States District Court for the Southern District of Florida

(November 17, 1970)

Before BROWN, Chief Judge, BELL and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: Appellants Gradsky and Roberts were convicted in 1962, along with eight co-defendants, for multiple violations of the Securities Act of 1933,[1] the mail fraud statute,[2] and for conspiracy to violate federal laws.[3] Numerous appeals by the various

[1] 15 U.S.C. §77q(a).

[2] 18 U.S.C. §1341.

[3] 18 U.S.C. §371.

co-defendants have been taken in this court and in the Supreme Court. The conviction of co-defendant George Levine was set aside, due in part to the admission by the Solicitor General that an illegal wiretap had been placed on Levine's telephone conversations, thereby "tainting" his conviction. *Levine v. United States*, 383 U.S. 265 (1966). Subsequently, the Supreme Court vacated the sentence of appellant Roberts and remanded to the district court for an evidentiary hearing to determine whether his rights had been violated by the electronic surveillance. *Roberts v. United States*, 389 U.S. 18 (1967). This court in a like manner ordered that the convictions of all the co-defendants involved in the conspiracy be set aside and that evidentiary hearings be held in the court below on the question of whether the illegal wiretaps tainted these convictions. Evidentiary hearings were conducted during December 1968 and April 1969. Appellants were represented by counsel but were themselves absent from these hearings.[4]

Upon conclusion of the above hearings, the court below, in a memorandum opinion of June 3, 1969, found no evidence of taint and ordered the convictions reinstated. Appellants filed motions to vacate and set aside that order, alleging that their presence at the evidentiary hearings was required by Rule 43[5] of the Federal Rules of Criminal

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[4]Appellant Gradsky was in a government hospital in the custody of a U. S. Marshal for a separate offense.

[5]Rule 43 provides as follows:

"The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and includ-

Procedure, and that their constitutional rights had been violated because of their absence during a "critical stage" of the proceedings.

In a subsequent hearing with all parties present, the district court determined that appellants' constitutional rights had not been infringed upon by their absence from the evidentiary hearings and denied the motions to vacate and set aside its order reinstating the convictions and sentences previously imposed. It is from this order that the present appeal is taken.

The record indicates that during the course of the evidentiary hearings conducted below, appellants were not present, but they were represented by a competent attorney who felt that their presence was unnecessary.[4]

At one point during the hearings, the court below asked appellants' trial counsel to delineate the specific portion of the Constitution upon which he was relying for the relief

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ing the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

[4] "THE COURT: Is Mr. Roberts Here?

"MR. ROSEN: He is not, your Honor, and Mr. Gradsky is not present either.

"THE COURT: Well, what do you have to say to that —.

"MR. ROSEN: As to Mr. Gradsky, your Honor, he is in custody.

"THE COURT: I know.

"MR. ROSEN: As I understand it, for an evidentiary hearing of this sort their presence is not required.

"THE COURT: Do you agree with that?

"MR. ROSEN: I do."

sought. He indicated that the sole basis for relief was that there had been an invasion of the right to counsel under the Sixth Amendment.[7]

Appellants contend that (1) they have a constitutional right to be present at an evidentiary hearing, and (2) that their constitutional rights cannot be waived at an evidentiary hearing in their absence, said waiver coming at a "critical stage" of the proceedings.

The government, however, raises a threshold question of standing. It argues that appellants Gradsky and Roberts did not have standing to challenge the electronic surveillance upon a co-defendant. Appellants' conversations were not monitored, nor was the surveillance conducted on any premises in which they held an interest. There is ample authority to support the government's contention. For example, in *Jones v. United States*, 362 U.S. 257 (1960), the Court stated:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else . . .

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[7] "THE COURT . . . To make it a little easier for you to deal with, I would like to know if the relief sought is sought exclusively under rights that are granted by the Sixth Amendment to the Constitution of the United States.

"MR. ROSEN: In light of the recent decisions, your Honor, I believe the only road we can travel will be under the Sixth Amendment."

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

See Alderman v. United States, 394 U.S. 165, 171-73; *United States v. James*, ____ F.2d ____ (5th Cir. 1970) [No. 26375, Oct. 2, 1970, at 7-8], *See also Dearinger v. Rhay*, 421 F.2d 1086 (9th Cir. 1970).[1]

Assuming, arguendo, that appellants possessed the requisite standing, we find no merit in their contentions concerning their non-presence at the evidentiary hearings. The Sixth Amendment and Fed. Rules Cr. Proc. 43 do guarantee a defendant the right to be present at the arraignment and "at every stage of the trial". No appellate court has extended this right to an evidentiary hearing. Appellants place great reliance on *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967) and *Cross v. United States*, 325 F.2d 629 (D.C.Cir. 1963). Both cases were concerned with actions occurring during the course of the trial. In *McKissick*, the trial court declared a mistrial because the defendant's attorney told the court in chambers that defendant had admitted perjury. The case was remanded to determine whether defendant was absent during the conversation in chambers, and if so, whether there was any prejudice to his rights. *See United States v. Lewis*, 420 F.2d 686, 687 (5th Cir. 1970).

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[1] In *Dearinger*, defendant had no standing to challenge the legality of a co-defendant's arrest or to rely on the "poisonous fruit" doctrine.

Appellants assert, however, that the Supreme Court has expressly declined to specify the procedure to be followed in evidentiary hearings, citing *Giordano v. United States*, 394 U.S. 310, 314 (1969) (concurring opinion). Justice Stewart, in the same paragraph, explained that "'Nothing in *Aldermen v. United States*, *Ivanovov v. United States*, or *Butenko v. United States*, *ante* p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance.' *Taglianetti v. United States* [394 U.S. (1961)]."

Appellants also rely on the presumption against the waiver of fundamental constitutional rights, as set out in *Johnson v. Zerbst*, 304 U.S. 458 (1938). The Court, in speaking of the right to counsel, was careful to explain, however, that an intelligent waiver "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." 304 U.S. at 464. We have carefully reviewed the record in the instant case, in which appellants' counsel made the decision that they would "travel the road" of the Sixth Amendment. There are frequent occasions in a criminal proceeding when an accused must trust in his attorney's ability to make tactical decisions and judgments without prior consultation. Appellants' counsel had ample opportunity for cross-examination during the evidentiary hearings, and we see no way in which appellants' presence would have aided him in the handling of their defense. Appellants, who were present for the hearing on their motions to vacate, could not assist their attorney in demonstrating any prejudice to their rights, and the court below found no prejudice whatsoever.

The issue during the evidentiary hearings was not one of guilt or innocence but one of "taint". The purpose was to allow government employees connected with the wiretap to give testimony relevant to the question of whether the evidence leading to appellants' convictions was tainted. Their testimony was insisted upon by appellants' counsel. It is apparent that these hearings were not a "critical stage" of the proceedings within Rule 43, and appellants' actual presence could not have aided their defense. In *Stein v. United States*, 313 F.2d 518, 522 (9th Cir. 1962), the court held that "(t)he presence of a defendant must bear a reasonably substantial relationship to the opportunity to defend. The Constitution does not assure 'the privilege of presence when presence would be useless, or the benefit but a shadow.'" See *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Pope v. United States*, 287 F.Supp. 214, 218 (W.D. Tex. 1967), *aff'd.* 398 F.2d 834, *cert. den.* 393 U.S. 871 (1968).

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[1]The situation in *Stein*, somewhat analogous to the case at bar, was summarized by the court as follows:

> "Finally, appellant contends that he was deprived of his constitutional right to be present at all stages of his trial. Specifically, he asserts that he was not present at a conference between court and counsel. At this conference were played recordings of incriminatory conversations between appellant and his co-conspirators, one of whom had worn a concealed recording device. The Government sought to introduce these recordings to corroborate testimony of co-conspirators and Government agents. The Court sustained appellant's counsel's objections to the recordings and, in addition, struck the Government agents' testimony concerning the contents of the recordings. Appellant contends that he should have been present to advise his counsel on the authenticity of the recordings and to determine whether they would have aided his defense, established his innocence, and impeached the testimony of his co-conspirators. This contention is also without merit."
>
> 313 F.2d at 522.

Furthermore, it is well established that Rule 43 must be considered together with Rule 52(a), Fed. Rules Cr. Proc., which provides that harmless error is to be disregarded. *Peterson v. United States*, 411 F.2d 1074, 1080 (8th Cir. 1969); *Estes v. United States*, 335 F.2d 609, 618 (5th Cir. 1964). In *Estes*, the court found no prejudice to defendant's substantial rights, where the court in his absence submitted written charges to the jury in response to jurors questions. In *Yates v. United States*, 418 F.2d 1228, 1229 (6th Cir. 1969), the court found no merit in the defendant's claim that his constitutional rights had been violated by his exclusion from a hearing to suppress evidence. We likewise reject appellants' contentions that their constitutional rights have been violated, and we find beyond a reasonable doubt that any possible error in their absence from the hearings did not affect their substantial rights. Rule 52(a), Fed. Rules Cr. Proc.; *Chapman v. California*, 386 U.S. 18 (1967).

In sum, we find that appellants were represented by competent counsel during their trial and at the evidentiary hearings. Appellants were personally present at all times except for these evidentiary hearings, and their presence at these hearings would not have aided their defense. They suffered no prejudice and were not deprived of a fair trial or due process of law. Accordingly, the ruling by the court below is AFFIRMED and the mandate shall issue forthwith. No stay will be granted pending petition for rehearing or application for writ of certiorari.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1110

ROBERT B. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On direct appeal of petitioner's 1962 conviction in the Southern District of Florida for securities and mail fraud offenses, this Court vacated the sentence and remanded the case to the district court for an evidentiary hearing as to whether his conviction was tainted by illegal electronic surveillance of conversations between a co-defendant and the co-defendant's attorney. 389 U.S. 18. The district court held a hearing, found no taint, and reinstated the conviction. The court of appeals affirmed (Pet. App. A).

At the hearing, petitioner was not present, but was represented by an attorney. When queried as to his

client's absence, the attorney responded that he considered petitioner's presence "not required" (Pet. 8). In the course of the hearing, the attorney stated that he was relying solely on a violation of the Sixth Amendment right to counsel and was not asserting a violation of petitioner's Fourth or Fifth Amendment rights. Petitioner contends that he had a right to be present at the post-trial hearing to determine taint and that his attorney could not "waive" his rights under the Fourth and Fifth Amendments (Pet. 9).

There is no need to reach these questions. The principal basis of the court of appeals' decision was that petitioner lacked standing, under *Alderman* v. *United States*, 394 U.S. 165, to challenge monitoring of his co-defendant's conversations since he did not take part in them and they did not occur on his premises (Pet. App. A 4–5). This ruling was clearly correct. The court below also properly held, alternatively, that the right to be present at all critical stages of a trial does not extend to a post-trial hearing to determine taint. As the opinion points out, the federal courts have uniformly held that the absence of the defendant at this type of hearing does not substantially impair the opportunity to defend and thus does not violate the Sixth Amendment[1] or Rule 43, F.R. Crim. P. Counsel's decision that reliance on the Fourth and Fifth Amendments would be fruitless was a tactical one, which it

[1] See *Stein* v. *United States*, 313 F. 2d 518, 522 (C.A. 9), certiorari denied, 373 U.S. 918; *Yates* v. *United States*, 418 F. 2d 1228 (C.A. 6); cf. *United States* v. *Lewis*, 420 F. 2d 686 (C.A. 5).

was proper for him to make, and not a "waiver" of petitioner's rights. In any event, the court of appeals properly determined that, in this case, any error on these issues was harmless beyond a reasonable doubt. Pet. App. 8; see also *Johnson* v. *United States*, 318 U.S. 189, 201–202.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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